Supreme Court, U.S.
FILED
JUL 10 1991
OFFICE OF THE CLERK

91-71

No. 91-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MING WAN LEUNG and LAU CHING CHIN,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Joint Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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JOINT PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May police officers circumvent the arrest warrant requirement under *Payton v. New York*, 445 U.S. 573 (1980), by gaining entry into a dwelling to effect an arrest through the use of a ruse.

PARTIES BELOW

The parties to the proceeding in the United States Court of Appeals for the Seventh Circuit were those parties named in the caption of the case in this Court, and two other parties, Han Ming Li and Sa Mei Chen.

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JOINT PETITION FOR WRIT OF CERTIORARI

Petitioners, Ming Wan Leung and Lau Ching Chin, respectfully request that a Writ of Certiorari be issued to review a judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above-captioned proceeding on April 11, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 929 F.2d 1204, entitled *United States v. Ming Wan Leung, et al.*, and is reprinted in the appendix hereto at pp. 1a-9a.

The United States District Court for the Northern District of Illinois (Conlon, D.J.) entered an order adopting the report and recommendation of a magistrate (Bucklo, U.S.M.) denying petitioner Lau Ching Chin's

motion to suppress, and this order and the magistrate's recommendation and report are reprinted in the appendix hereto at pp. 11a-20a.

The order of the United States Court of Appeals for the Seventh Circuit denying the petitioner's suggestion for rehearing en banc is reprinted in the appendix hereto at p. 20a.

JURISDICTION

This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

The Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On October 26, 1989, at approximately 7 a.m., four DEA agents, who concededly lacked a warrant, forcibly entered a Chicago hotel room occupied by Ming Wan Leung and Lau Ching Chin upon a ruse. The agents suspected that Ming and Lau were members of a syndicate from New York that had come to Chicago to purchase 45 kilograms of heroin.

Earlier that morning, agents had arrested co-defendants Han Ming Li and Sa Mei Chen at a nearby hotel as part of an undercover investigation. After arresting Han and Sa, the agents commenced a search of neighboring hotels for additional Asian suspects eventually leading them to a Holiday Inn where Ming and Lau were staying.

Agent Myer knocked on Ming's and Lau's hotel room door, but there was no response. At the direction of Agents Stickney and Meyer, a hotel housekeeper then knocked on the hotel room door, and announced "housekeeping." The government conceded on appeal that the housekeeper was acting as a government agent at the time. A female voice inside the room asked "What?," and the housekeeper responded that she needed to clean the room. Lau opened the door part way, and saw Agent Meyer. Meyer identified Lau as a woman he had seen earlier that morning in the company of co-defendant Sa, and yelled: "That's her." Lau then attempted to shut the door, but the agents barged into the room. Lau fainted, and fell to the floor. Ming was apprehended by agents on the balcony outside the hotel room.

After formally arresting Ming and Lau, the agents searched the room. They recovered a mobile telephone, $102,000 in cash, a paper, and Lau's purse. Inside the purse was a piece of paper on which Lau had apparently written certain information that an undercover officer had given her to facilitate a narcotics transaction, including the name and address of two hotels, a code name, and a telephone number at which Agent Ly could be reached.

A superseding indictment, filed January 23, 1990, charged Ming, Lau, Sa and Han, in two counts, with conspiracy to possess with intent to distribute 44.8 kilograms of heroin, and interstate travel with intent to engage in a narcotics transaction involving heroin.

Counsel for Ming never filed a motion to suppress the evidence seized by DEA agents in the warrantless search of his hotel room. Counsel for Lau filed a brief suppression motion which questioned the lack of a warrant, consent, and probable cause, but then failed to press the warrant issue at a suppression hearing. Consequently, the magistrate's opinion denying Lau's mo-

tion to suppress discussed only the probable cause issue, and the district court similarly limited its order denying suppression to the probable cause issue.

Trial commenced on March 9, 1990. Lau pleaded guilty shortly after the government rested its case. Counsel for Lau made no attempt to preserve for appeal the denial of the suppression motion pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure. Lau subsequently moved to withdraw her guilty plea, but the court denied this motion. Ming proceeded with the trial, and on March 15, 1990, was found guilty as charged. Ming and Lau received sentences of 293 and 210 months, respectively, followed by five years of supervised release. Ming and Lau timely appealed their convictions and sentences.

On appeal, Ming argued that he was denied the effective assistance of counsel because his trial counsel had failed to litigate a meritorious suppression motion. *See Kimmelman v. Morrison*, 477 U.S. 365 (1986). Ming maintained that the warrantless intrusion into his hotel room by use of a ruse, which negated the voluntariness or any purported consent to enter, was illegal. Similarly, Lau argued on appeal that she was denied the effective assistance of counsel because her trial counsel had negligently abandoned that portion of her motion to suppress that addressed the warrantless entry into the hotel room, and had neglected to argue that Lau's act of opening the hotel room door was non-consensual since it was precipitated by a ruse.

In its opinion, the court of appeals squarely addressed the merits of the Fourth Amendment question raised by Ming and Lau, holding that the agents' use of a ruse, upon which the subsequent police entry was based, was permissible because "[p]olice may use ruses to obtain entry, provided they do not exceed the scope of the consent." *Id.*, 929 F.2d at 1208, citing *United States v. Scherer*, 673 F.2d 176, 182 (7th Cir.), *cert. denied*, 457

U.S. 1120 (1982). The court concluded that Lau "willingly exposed" her face to view by opening the door in response to the agents' ruse, that probable cause for an arrest was established once the agents saw and recognized Lau, and that the agents were entitled to forcibly pursue Lau into the room under *United States v. Santana*, 427 U.S. 38 (1976). *Id.*

Ming and Lau then filed a suggestion for rehearing in banc in which they argued, among other things, that the Seventh Circuit's opinion substantially undercut this Court's decision in *Payton v. New York*, 445 U.S. 573 (1980), and conflicted with case precedent from other circuit courts invalidating police entries effected through the use of police trickery and deception. Nevertheless, the Seventh Circuit denied the suggestion for rehearing in banc.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD RESOLVE THE CONFLICT IN THE CIRCUIT COURTS OF APPEAL OVER WHETHER AGENTS MAY CIRCUMVENT THE ARREST WARRANT REQUIREMENT UNDER *PAYTON v. NEW YORK*, 445 U.S. 573 (1980), BY GAINING ENTRY INTO A DWELLING TO EFFECT AN ARREST THROUGH THE USE OF A RUSE

This case falls into a void between the pronouncements of this Court which hold, on the one hand, that police officers must obtain a warrant before entering the home of a suspect to effect an arrest, *Payton v. New York*, 445 U.S. 573 (1980), and on the other hand, that police officers acting in an undercover capacity may gain entry to the home of a suspect without a warrant simply by misrepresenting their identities as part of an undercover investigation. *Lewis v. United States*, 385 U.S. 206 (1966).

In *Payton*, the Court held that, absent exigent circumstances or consent, the Fourth Amendment prohibits the

police from making a warrantless entry into a suspect's home to make a routine felony arrest. In *Steagald v. United States*, 451 U.S. 204 (1981), the Court extended this rule by holding that police officers who enter a third person's home to find a suspect must have *both* an arrest warrant for the suspect and a search warrant for the third person's home.

A significant rationale for *Payton* and *Steagald* was this Court's recognition that the warrant requirement of the Fourth Amendment was designed to protect the homes of citizens from the indiscriminate, house-to-house searches that had been conducted by the British to oppress the colonists prior to the Revolution. *Payton*, 445 U.S. at 583; *Steagald*, 449 U.S. at 215.

> "Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of British tax laws. They were denounced by James Otis as 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book,' because they placed the 'liberty of every man in the hands of every petty officer.' The historic occasion of that denunciation, in 1761 at Boston, has been characterized as 'perhaps the most prominent event which inaugurated the resistance of the colonies to the oppression of the mother country. 'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.' "

Payton, 445 U.S. at 583 n. 21, quoting *Boyd v. United States*, 116 U.S. 616, 625 (1886).

This Court has long recognized an exception to the warrant requirement, however, when police officers enter the

home of a suspect by misrepresenting their identities as part of an undercover investigation. In *Lewis v. United States*, *supra*, the Court upheld a police officer's warrantless entry into a suspect's home as part of an undercover investigation, "*for the specific purpose of executing a felonious sale of narcotics.*" 385 U.S. at 211 (emphasis added). Such an entry onto property is permissible because, in an undercover investigation, the agent does not see, hear, or take anything "not contemplated [by the defendant] as a necessary part of the illegal business." *Id.*

Two circuit courts, including the Seventh, have extended *Lewis* to undercover investigations where the purpose of the entry onto property is not to effect an immediate drug sale, but rather, to verify that drug dealing or other criminal activity is in fact taking place on the premises. *See United States v. Scherer*, *supra*; *United States v. Wright*, 641 F.2d 602 (8th Cir.), *cert. denied*, 951 U.S. 1021 (1981); *United States v. Raines*, 536 F.2d 796 (8th Cir.), *cert. denied*, 429 U.S. 925 (1976).

But until this case, the circuit courts had agreed that *Lewis* did not permit a warrantless police entry into a suspect's home to make an arrest, and that such a situation was controlled by *Payton* and *Steagald*. *See, e.g.*, *Duncan v. Storie*, 869 F.2d 1100, 1102 (8th Cir.), *cert. denied*, 110 S. Ct. 152 (1989) ("consent" to open a door or come to a doorway induced through deceit or trickery is invalid and cannot substitute for a warrant since suspect has not "voluntarily placed himself in a public place and willingly relinquished the expectation of privacy that he is entitled to when he is within his home"); *United States v. Morgan*, 743 F.2d 1158, 1166 (6th Cir.), *cert. denied*, 471 U.S. 1061 (1985) (defendant summoned to the door of his home by coercive police behavior outside, including the use of bull horns and spotlights, does not "'voluntarily expose himself to a warrantless arrest' by appearing at the door"); *United States v. Johnson*, 626 F.2d 753 (9th Cir. 1980), *aff'd on other grounds*, 457

U.S. 537 (1982) (warrantless police entry invalid where defendant had not voluntarily exposed himself to warrantless arrest by opening his door to agents who misrepresented their identities).[1]

Although society's interest in combatting crime is, of course, significant, the underlying rationale of *Lewis*, that no warrant is required where an undercover officer merely accepts a suspect's invitation to transact unlawful business specifically contemplated by the suspect, is simply not applicable in an arrest situation where a person is tricked or coerced into opening a door. Such an individual surely cannot be said to have voluntarily exposed himself to view or consented to the police entry since he did not contemplate that police officers were at the door to arrest him. Indeed, the agents' use of deception in this case, for example, rendered Ming's and Lau's purported "consent" to entry far *less* voluntary than that of defendant Riddick in *Riddick v. New York*, 445 U.S. 573 (1980), in which the Court held Riddick had not voluntarily exposed himself to a warrantless arrest when he allowed his three-year-old son to open the door of his home. *Riddick*, 445 U.S. at 584-85.

The court of appeals' extension of *Lewis* to the arrest situation substantially undermines the warrant requirement by inviting police officers to take the shortcut of simply tricking suspects into opening the doors of their

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[1] Even prior to *Payton*, the case law in the circuit courts was consistent with the present majority rule. *See, e.g., United States v. Phillips*, 497 F.2d 1131 (9th Cir. 1974) (agent may not compel his entry into a suspect's premises to conduct a search by claiming to be a police officer investigating a non-existent burglary); *Gatewood v. United States*, 209 F.2d 789 (D.C. Cir. 1953) (police officers illegally entered home to arrest suspect where they misrepresented they were Western Union agents); *Fraternal Order of Eagles v. United States*, 57 F.2d 93 (3d Cir. 1932) (prohibition agents illegally entered a private lodge where they misrepresented they were members of the lodge).

homes.[2] "[T]o uphold warrantless arrests at a person's home whenever law enforcement officers successfully obtain his presence at a door too readily allows subversion of the *Payton* principle." *United States v. McCool*, 526 F.Supp. 1206, 1209 (M.D.Tenn. 1981). The practical effect of such a precedent would be to give police officers blanket authority to enter and search homes at their whim, without the necessity of obtaining a warrant from a neutral judicial officer. Yet, the principal purpose of the warrant requirement:

> . . . is to allow a neutral judicial officer to assess whether the police have probable cause to make an arrest or conduct a search . . . [T]he placement of this checkpoint between the Government and the citizen implicitly acknowledges that an "officer engaged in the often competitive enterprise of ferreting out crime," *Johnson v. United States*, 333 U.S. 10, 14 (1948), may lack sufficient objectivity to weigh correctly the strength of the evidence supporting the contemplated action against the individual's interests in protecting his own liberty and the privacy of his home.

Steagald, 451 U.S. at 212.

The Seventh Circuit's enthusiastic approval of the agents' conduct guarantees that the deceptive practice will be repeated.[3] To resolve the uncertainty in the law

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[2] Regarding the police trickery in this case, the Seventh Circuit commented: "Innocent persons would have been fully protected; the agents' tactics were a threat only to the guilty." 929 F.2d at 1208. Of course, the same could be said of the colonists, whom the British subjected to indiscriminate searches and seizures under the authority of "general warrants." *Payton v. New York*, 445 U.S. at 583 n. 21. Indeed, the agents' warrantless entry to look for Ming and Lau was exactly the type of "house-to-house" search condemned by this Court in *Payton* and *Steagald*.

[3] Indeed, the court of appeals stated that the agents' conduct "appears to us to be models for other agents to follow." *Id.* 929 F.2d at 1207.

and the conflict between the circuits, the Court should grant certiorari.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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July 1991

APPENDIX

APPENDIX

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 90-2325, 90-2326, 90-2359, & 90-2495

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MING WAN LEUNG, *et al.*,
Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 89 CR 906—Suzanne B. Conlon, *Judge*

ARGUED FEBRUARY 14, 1991—DECIDED APRIL 11, 1991

Before COFFEY and EASTERBROOK, *Circuit Judges,* and ESCHBACH, *Senior Circuit Judge.*

EASTERBROOK, *Circuit Judge.* Long before the modern craze for cocaine, there was a flourishing opium trade in the Orient. Patterns formed a hundred years ago survive many changes in enforcement policy. The predictability of unpredictability helped ensnare one cell of a larger enterprise.

A syndicate in New York ordered 45 kilograms (about 100 pounds) of 83% pure white heroin from Thailand. Delivery was to occur in Chicago, where the buyers would pay the courier $10,000 for his efforts. Neither the sellers nor the buyers trust their agents in a deal of this magnitude. Payment for the shipment occurred between the principals. The Thai courier was to produce a 20 baht note (the baht is the unit of Thai currency, worth 4¢) with a serial number ending in '01, receiving the bill two digits higher. Each side was to deliver the note to its principals, confirming the exchange. The buyer's agents would bring back the heroin, the best proof of faithful service. What would happen to the seller's agent if he reappeared without either the heroin or the '03 note is too grisly to contemplate.

The Thailand National Police got wind of this impending transaction and alerted the Drug Enforcement Agency. One way or another (the record does not reveal how, probably to protect the health of those involved) a DEA agent was substituted for the original Thai courier. Agent Hoang Ly, posing as the courier, checked into a Ramada Inn near O'Hare Airport in Chicago and called New York to notify the buyer. Sa Mei Chen answered the phone. Ly asked for "Khooi", the arranged code, and introduced himself as "Mooshoo", the courier's code name. Sa asked Ly to make the delivery in New York. Ly declined, and the two agreed to talk in a few hours when someone who spoke English better than Sa would be available. The next time Ly called, Sa turned the phone over to Lau Ching Chin. After asking Ly whether he had the "lucky money", Lau told Ly that "her friends" would pick up the heroin at noon the next day. She told Ly that the 10,000 fee would be "no problem" and that he should expect to deliver the heroin to two Chinese.

Ly briefed the other DEA agents about what to expect during the pickup. Based on his 23 years of experience in the oriental heroin trade, Ly told the agents that the

Chinese would appear before the agreed pickup time, and that more than two would come. The leader, Ly thought, would linger in the background directing operations. Expecting the unexpected, the agents planted themselves around the hotel to watch and pounce.

Sa and Lau appeared in the lobby of the Ramada Inn between 3:00 and 3:45 a.m. the next day to reconnoiter. Lau called Ly's room at 4:00 a.m. to say that the pickup would be made presently. As instructed, Ly went to the lobby at 4:45 a.m. and exchanged code names with Sa, who conducted Ly to a blue Honda in the parking lot. Sa said that he had driven from New York to Chicago in this car and would use it to return the heroin. Next stop was Ly's room, where Sa paid the $10,000 and received the key to a locker containing the heroin. Sa told Ly that for the next delivery they would use 20 baht notes ending in '02 and '04. Ly called for a porter to move the locker to the car. This was the signal for the other agents, who closed in. Sa jumped out the window but was nabbed in the parking lot before he could reach the car. The agents fanned out to find Sa's confederates.

Agent Kirk Meyer took part in the hunt. He examined the car and saw a walkie-talkie on the dashboard. Shortly before 6:00 a.m., perhaps half an hour after Sa's capture, Meyer walked into a coffee shop across the street from the Ramada Inn. He found an Asian man staring intently at the motel. From this vantage point one could see the main entrance and the door opening on the parking lot, but not the blue Honda. Between the man's legs was a bag, from which a stubby black antenna protruded. Meyer identified himself as an officer and asked the man for identification. He replied in broken English that he is Thai and had no identification. Meyer began to speak to the man in Thai. On hearing Thai spoken, the man began to perspire; his eyes opened wide, his hands started to shake, and he rocked back on his heels. He lapsed into silence. Unsuccessful in his attempts to communicate in

Thai, Meyer reverted to English. The man then admitted he is Chinese, and Meyer arrested him. He is Han Ming Li, and the contents of the bag were used in evidence against him.

Still seeking Lau and any additional members of the team, the agents started canvassing nearby hotels. Agent Meyer arrived at a Holiday Inn about 7:00 a.m. and learned from the night manager that an Asian woman and two Asian men had checked into the hotel at about 3:00 a.m., arriving without reservations or luggage. Meyer and agent Jeffrey Stickney accompanied one of the motel's housekeepers to these rooms. The housekeeper knocked on the doors and said that she wanted to clean. A woman opened one of the doors. Agent Meyer recognized the woman (who turned out to be Lau) as one of the pair who had reconnoitered the lobby of the Ramada Inn. He yelled: "That's her". Lau tried to slam the door, but the agents barged in. Lau appeared to faint, but the agents were not distracted. Stickney saw a shadow in the curtain and looked out the door leading to the balcony. He spied a man (Ming Wan Leung) on construction scaffolding trying to escape. Meyer followed Ming onto the scaffolding and, with help from other agents, returned him to the room. The agents searched the room and found $102,000 in cash, a mobile phone, a pager, and notes containing the telephone number of a hotel in Bangkok and the information Ly had provided over the phone. An agent asked Lau how much money there was; Ming replied "$100,000".

Other incriminating evidence turned up, but the details are unimportant. Ming, Sa, Han, and Lau were indicted for conspiring to possess and distribute heroin, in violation of 21 U.S.C. § 846 and 18 U.S.C. § 2, and for traveling in interstate commerce with the intent to transact illegal business, in violation of 18 U.S.C. § 1952. Three pleaded guilty before the end of the trial. Ming, who was convicted by the jury, does not challenge the sufficiency of

the evidence against him. They received terms under the Sentencing Guidelines between 121 months (Han) and 293 months (Ming, whose sentence was enhanced for a leadership role).

The principal arguments of all four defendants concern the arrests, searches, and statements. Some of the defendants preserved their arguments, and others say that their lawyers were incompetent in failing to do so. It is simple to resolve the search, seizure, and interrogation questions on the merits, and we accordingly do not decide whether the attack on the performance of counsel would be a sufficient way to smuggle these issues through the back door. What the defendants characterize as unconstitutional arrests and interrogations appear to us to be models for other agents to follow. At each step the agents acted professionally, with ample foundation and within the bounds set by the Constitution.

Sa was caught in flight. Both he and his car could be searched following the arrest. *United States v. Robinson*, 414 U.S. 218 (1973); *United States v. Ross*, 456 U.S. 798 (1982). What agent Meyer saw in the car provided an important strand in the net that ensnared Han, whom Meyer discovered watching the Ramada Inn. A lookout was inevitable in a transaction of this size, and the sentry would need a way to communicate with others —the walkie-talkie. Han was in a position to watch the principal entrances to the motel. Either the appearance of agents or a commotion would have allowed a person sitting where Han was to alert the others. (Unfortunately for the buyers, the agents were already inside the motel expecting an early arrival.) Han insists that for all Meyer knew he was an innocent bystander, sipping tea while watching the sunrise. Yet Meyer knew that Han was in a lookout's position and possessed a lookout's gear. Han's attention was fixed on the Ramada Inn. When asked his nationality, Han lied. What happened next must have confirmed Han's worst fear: an occidental who

has identified himself as an agent starts speaking Thai. That could occur only if something had gone wrong with the delivery. Han reacted with shock and fear. When he admitted being Chinese, Han not only revealed his lie (why would a Chinese say he is Thai?) but also linked himself to Sa and Lau. Probable cause is a practical concept, *Illinois v. Gates*, 462 U.S. 213 (1983); *United States v. Chaidez*, 919 F.2d 1193, 1199 (7th Cir. 1990), and by the time Han conceded his nationality (if not before) Meyer had probable cause to arrest him. Everything Han did is consistent with membership in the buyers' team; very little he did is consistent with being a bystander. The agent was entitled to seize and search Han's bag incident to the arrest, and its contents could be used in evidence. We reach this conclusion without deciding the extent to which an appellate court should defer to the district judge's decisions concerning probable cause and the reasonableness of a search, a subject under discussion in this circuit. See *Chaidez*, 919 F.2d at 1196; *United States v. McKinney*, 919 F.2d 405 (7th Cir. 1990); *United States v. Malin*, 908 F.2d 163, 169-70 (7th Cir. 1990) (concurring opinion).

The arrest entry at the Holiday Inn was eminently reasonable too. Ly's experience told the agents that there would be more than two Chinese. A woman (Lau) had been seen in the lobby but was at large. Knowledge that a group of Asians, including a woman, arrived unexpectedly and without luggage at 3:00 a.m. at a Holiday Inn justified further investigation. The agents used a ruse: a housekeeper knocked on the door, and Lau's visage provided probable cause to believe that the occupants of the room were involved in the heroin deal. Police may use ruses to obtain entry, provided they do not exceed the scope of the consent. *United States v. Scherer*, 673 F.2d 176, 182 (7th Cir. 1982). As things turned out, no one, not even the housekeeper, entered the room until probable cause had been established. All the agents got from the ruse was a look at Lau's face, which she will-

ingly exposed. The tactics respected the privacy interests of the occupants, who could have elected not to answer the knock on the door. If someone other than Lau had opened the door, the agents would have departed, leaving the occupants undisturbed (and with a cleaner room). Innocent persons would have been fully protected; the agents' tactics were a threat only to the guilty.

Having recognized Lau as the person who toured the lobby of the Ramada Inn, the agents had probable cause to make an arrest. Lau maintains that because she retreated and slammed the door, the agents had to halt and obtain a warrant. Not so. Passing the threshold does not cut off the agents' ability to follow. *United States v. Santana*, 427 U.S. 38 (1976). If, despite *Santana*, following a person inside sometimes requires a warrant, *United States v. Berkowitz*, No. 89-2125 (7th Cir. Mar. 15, 1991), slip op. 16-21, exigent circumstances make warrantless action on probable cause reasonable. These circumstances were exigent. Once the agents arrested Sa, it was only a matter of time before the others, expecting and not receiving a message, fled. The agents did not know where these others could be found, even who they were. There was nothing to do but beat the bushes, which the agents did. Having found whom they sought, they could not tarry. As Ming's flight shows, the suspects could have escaped out the back while agents guarded the front. Who could have known what evidence would have been destroyed had the agents been able to barricade the doors to the room while sending for a warrant? These agents were hot on the trail and acted reasonably.

Once inside the room, the agents were entitled to make a protective sweep, *Maryland v. Buie*, 110 S. Ct. 1093 (1990), which would have revealed Ming's presence even if agent Stickney had not see Ming's shadow. The items the agents seized were all within Lau's reach, making their seizure reasonable. Most of the questions the agents

asked, before they gave *Miranda* warnings, sought routine information that is outside *Miranda*'s scope. *Pennsylvania v. Muniz*, 110 S. Ct. 2638, 2650 & n.14 (1990). We need not decide whether the query about the amount of money was a routine booking question (designed to protect the officers from a claim that they pilfered some of the cash before turning in the rest for inventory). The agents asked Lau, believing that she is the only one who speaks English; Ming leaped in with the answer. Ming was not under interrogation, see *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980), and information he volunteered was properly admitted.

Most of the defendants' remaining arguments ask us to review discretionary decisions the district judge made during trial or in the course of sentencing. The deferential standard of review dooms these arguments, which we do not discuss separately. For example, Lau contends that the court should have given her fourth attorney more time to prepare for the sentencing proceeding. But the court postponed the sentencing twice at the request of her third lawyer, and the judge allowed both the third and fourth to present arguments at sentencing. Lau's attempt to paint this as a deprivation of the right to counsel (the fourth lawyer, she says, needed more time to be effective) is unavailing. The last we need address is Ming's contention that the court admitted hearsay over his objection.

Agent Ly told his colleagues that Chinese heroin dealers work in groups, with one leading from the rear. Ly testified about his role in these events and also told the jury about his experience concerning group operations. After his testimony, Ly returned to Thailand. Meyer recalled, during redirect testimony, that Ly also told the agents where they would find the leader. Ming's lawyer objected on grounds of hearsay. The district court overruled this objection, remarking that Han's lawyer had opened the door during cross-examination of agent Meyer.

(Han did not plead guilty until the close of the government's case.) This ruling was unresponsive to the objection. Cross-examination may indeed "open the door" to a subject on redirect, but it does not authorize the use of evidence violating another rule, such as the complex of rules limiting hearsay. That a particular subject is fair game says nothing about how the subject is to be proved. On appeal the prosecutor argues that the testimony was offered not for its truth but to show why agent Meyer conducted the investigation as he did. That avoids the hearsay problem at the expense of making the testimony irrelevant—at least, irrelevant to guilt, as opposed to a motion to suppress. Ming did not have a motion to suppress outstanding, and the district court did not give a limiting instruction.

Although the admission of this testimony was error, it was also harmless. The jury was not being called on to determine whether Ming was a "leader", the only respect in which Meyer's hearsay supplemented Ly's direct testimony. The district judge had to determine in sentencing whether Ming was a leader, but the hearsay rules do not apply to sentencing, Fed. R. Evid. 1101(d)(3), so the use of the testimony after trial is not objectionable. The evidence against Ming, as against the others, was overwhelming. Although the prosecutor referred to this bit of hearsay during closing argument, we are confident that it did not have substantial influence on the course of the trial, see *United States v. Lane*, 474 U.S. 438, 449 (1986); *Kotteakos v. United States*, 328 U.S. 750, 776 (1946). Ming's case has been hopeless since the moment of his arrest.

AFFIRMED

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

(Rev. 2/5/88)

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Name of Assigned Judge or Magistrate	Brian Barnett Duff	Sitting Judge/Mag. If Other Than Assigned Judge/Mag.	Elaine E. Bucklo
Case Number	89 CR 906-3	Date	February 20, 1990
Case Title	United States of America v. Man Ming Li, Sa Mei Chen, and Lau Ching Chin		

MOTION: [In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3d-party plaintiff, and (b) state briefly the nature of the motion being presented]

DOCKET ENTRY: (The balance of this form is reserved for notations by court staff.)

(1) ☐ Judgment is entered as follows: (2) ☒ [Other docket entry:]

Enter Report and Recommendation of Magistrate Elaine E. Bucklo regarding defendants Man Ming Li's and Lau Ching Chin's motions to suppress evidence gathered following their arrest, claiming that they were arrested without probable cause. All matters relating to the referral of this action having been resolved, this case is returned to the assigned Judge for further proceedings.

(3) ☐ Filed motion of [use listing in "MOTION" box above].

(4) ☐ Brief in support of motion due _____.

(5) ☐ Answer brief to motion due _____ Reply to answer brief due _____.

(6) ☐ Hearing / ☐ Ruling on _____ set for _____ at _____.

(7) ☐ Status hearing ☐ held ☐ continued to ☐ set for ☐ reset for _____ at _____

(8) ☐ Pretrial conference ☐ held ☐ continued to ☐ set for ☐ reset for _____ at _____

(9) ☐ Trial ☐ set for ☐ reset for _____ at _____.

(10) ☐ ☐ Bench trial ☐ Jury trial ☐ Hearing held and continued to _____ at _____

(11) ☐ This case is dismissed ☐ with ☐ without prejudice and without costs ☐ by agreement ☐ pursuant to ☐ FRCP 4(j) (failure to serve) ☐ General Rule 21 (want of prosecution) ☐ FRCP 41(a)(1) ☐ FRCP 41(a)(2)

(12) ☐ (For further detail see ☐ order on the reverse of ☐ order attached to the original minute order form.)

	No notices required.		number of notices	Document #
X	Notices mailed by judge's staff.		date docketed	
	Notified counsel by telephone.		docketing dpty initials	
	Docketing to mail notices.		date mld. notices	
	Mail AO 450 form.			
	Copy to judge/magistrate.			
	courtroom deputy's initials	Date/time received in central Clerk's Office	mailing dpty initials	

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Illinois Circuit Form
(rev. 3/88)

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Name of Assigned Judge or Magistrate	Susanna B. Conlon	Sitting Judge/Mag., If Other Than Assigned Judge/Mag.	
Case Number	89 CR 906	Date	April 9, 1990
Case Title	United States v. Leung, et al.		

MOTION: [In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3d-party plaintiff, and (b) state briefly the nature of the motion being presented]

Objections of defendants Lau Ching Chin and Han Ming Li to the Magistrate's Report and Recommendation

DOCKET ENTRY: (The balance of this form is reserved for notations by court staff.)

(1) ☐ Judgment is entered as follows: (2) ☒ [Other docket entry:]

Several days before trial, defendants Chin and Li filed objections to the magistrate's report recommending denial of their motions to suppress. At trial, this court heard substantial evidence establishing probable cause to arrest both of these defendants. Accordingly, their objections to the magistrate's report are overruled. Defendants' motions to suppress are denied.

Suzanne B. Conlon

(3) ☐ Filed motion of [use listing in "MOTION" box above].
(4) ☐ Brief in support of motion due ____.
(5) ☐ Answer brief to motion due ____ Reply to answer brief due ____
(6) ☐ Hearing ☐ Ruling on ____ set for ____ at ____
(7) ☐ Status hearing ☐ held ☐ continued to ☐ set for ☐ reset for ____ at ____
(8) ☐ Pretrial conference ☐ held ☐ continued to ☐ set for ☐ reset for ____ at ____
(9) ☐ Trial ☐ set for ☐ reset for ____ at ____
(10) ☐ Bench trial ☐ Jury trial ☐ Hearing held and continued to ____ at ____
(11) ☐ This case is dismissed ☐ without ☐ with prejudice and without costs ☐ by agreement ☐ pursuant to ☐ FRCP 4(j) (failure to serve) ☐ General Rule 21 (want of prosecution) ☐ FRCP 41(a)(1) ☐ FRCP 41(a)(2)
(12) ☐ [For further detail see ☐ order on the reverse of ☐ order attached to the original minute order form.]

	No notices required.	ED-1 RECEIVED FOR DOCKETING 90 APR -9 PM 5:07	1	number of notices
	Notices mailed by judge's staff.			date docketed
	Notified counsel by telephone.			docketing dpty. initials
X	Docketing to mail notices.		APR 10 1990	date mailed notices
	Mail AO 450 form.			
	Copy to judge/magistrate.			
	courtroom deputy's initials: mkw	Date/time received in central Clerk's Office	mailing dpty. initials	Document #

BEST AVAILABLE COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 89 CR 906-3

UNITED STATES OF AMERICA,
Plaintiff,

v.

MAN (*sic*) MING LI, SA MEI CHEN,
and LAU CHING CHIN,
Defendants.

REPORT AND RECOMMENDATION

On October 26, 1989, Man (*sic*) Ming Li, Lau Ching Chin and Sa Mei Chen were arrested in Rosemont, Illinois, and charged with conspiracy to distribute heroin. Mr. Li and Ms. Chin have moved to suppress evidence gathered following their arrest, claiming that they were arrested without probable cause. The defendants' motions have been referred to me for a report and recommendation, and I held an evidentiary hearing on February 16, 1990. I recommend that both motions be denied.

Facts

Drug Enforcement Administration ("DEA") Agent George Ohlin testified first at the hearing. He stated that in October, 1989, DEA agents in Thailand learned of a shipment of white heroin that was to be delivered to Chicago, and then transported to New York City by an individual from there. The DEA intercepted the shipment, about 100 pounds of white heroin, and also intercepted a New York telephone number and instructions as to how the delivery was to take place.

The heroin arrived in Chicago on October 25, 1989, accompanied by DEA Agent Hoang Ly, a Thai. At 8 a.m. that morning, he telephoned the New York City number obtained in Thailand, which was registered to a portable phone in New York's Chinatown district.

The person Agent Ly spoke with, who he later learned was Sa Mei Chen, asked him to bring the heroin to New York, but Agent Ly said that the deal was for someone to pick the heroin up in Chicago. Mr. Chen then asked Agent Ly to call back a few hours later when he would have someone there who spoke better English.

Agent Ly called again at around 11 a.m. Mr. Chen immediately gave the telephone to a woman, whom Agent Ly later identified through her voice as Ms. Chin. According to Agent Ohlin, when Mr. Ly asked a question that required specific information to be given or a decision to made, Ms. Chin stopped and asked someone standing in the room how to answer. Agent Ohlin said that he could not determine if there were one or two people with Ms. Chin. During this call, Agent Ly and Ms. Chin (after consultation) agreed that two Chinese persons would come to Chicago to pick up the heroin. Agent Ohlin testified that, although the word "heroin" was not used, it was clear from the context that the conversation was about a drug transaction. The parties also aranged code names.[1]

On October 26, 1989, at 3:10 a.m., Agent Ly received a phone call in his room at the Ramada Inn in Rosemont, Illinois, from Ms. Chin. Ms. Chin said that the people wanted to pick up the heroin now, rather than at noon as originally agreed. Agent Ly received a second call

[1] Agent Ohlin also testified that each party to the drug transaction had a 20 Baht (Thai currency) note with almost consecutive serial numbers, with the last two digits of one ending in 01 and the other ending in 03. These two notes were to be exchanged as part of the transaction, with one to be returned to Thailand to show the deal had been completed.

from Ms. Chin about 15 minutes later. Agent Ly said he would meet them in the lobby and asked for a clothing description.

Based on that description, Agent Ly met Mr. Chen in the lobby a few minutes later. Mr. Chen took the agent to the parking lot and pointed out a blue Honda, and told him that the heroin was to go in the car. Then, they went to Agent Ly's room. Mr. Chen examined the heroin, and the men exchanged the 20 Baht notes. Shortly thereafter, Mr. Ly and agents stationed in a room across the hall attempted to arrest Mr. Chen, who jumped out the window and ran for the parking lot. He was arrested in the parking lot about 20 feet from the blue Honda he had pointed out to Agent Ly.

DEA Agent Kirk Meyer also testified at the hearing. Agent Meyer has an M.A. in political science with an emphasis in Southeast Asian studies. He has studied in Thailand, and speaks Thai. He was part of the surveillance team at the Ramada Inn on October 23, 1989. I found his testimony to be very credible.

According to Agent Meyer, at the briefing for the surveillance for the Thai heroin deal, agents experienced in white heroin trafficking told him that, based on their experience, he should expect two things. First, he was told that Chinese white heroin dealers always traveled in groups; second, he was told that Chinese dealers usually showed up early.

At about 3:10 a.m., Agent Meyer was sitting in a chair near the entrance to the lobby of the Ramada Inn, when he saw an oriental man and woman, whom he now identifies as Mr. Chen and Ms. Chin, walk across the lobby to a bank of telephones. According to Agent Meyer, Mr. Chen picked up the first phone, looked at it, put it back, skipped the next phone, then picked up the third phone, looked at it, and then put it back. Then, the man and

woman walked out the north exit of the lobby, and Agent Meyer began to wake up other agents.

Agent Meyer was stationed across the hall from Agent Ly's room, and saw Mr. Chen enter Agent Ly's room through a peephole in the door. During the attempted arrest, he saw Mr. Chen take the screen from the window and jump, and saw Mr. Chen run toward the blue Honda before he was arrested. After the arrest, Agent Meyer and Agent Banks walked over to the car, looked in and saw a walkie-talkie on the console. Agent Meyer said that it looked like a large television channel changer with an antenna extending from one end.

Agent Meyer testified that Agent Ly had told him that two Chinese males would be showing up to pick up the heroin, so he decided to look around. By this time, it was getting light out, and was after 5 a.m., and he walked across Mannheim Road to a small coffee shop.

As he entered the coffee shop, he saw an oriental man, now known to be Mr. Li, seated alone at the corner of an L-shaped lunch counter, staring intently out the window of the coffee shop in the direction of the Ramada Inn parking lot across Mannheim Road. Agent Meyer testified that, althought the door to the coffee shop was only about four feet from where he was sitting, and the weather was cool, Mr. Li did not look up when he entered. Agent Meyer noticed that there was a plastic bag with a drawstring around the top, like a bag from a shoe store, sitting at Mr. Li's feet on a footrest ledge attached to the front of the counter. He also saw an antenna and the top of what appeared to be a walkie-talkie protruding from the bag.

At that point, Agent Meyer took out his badge, held it in front of Mr. Li, and told him that he was a police officer and asked for identification. Mr. Li stated that he did not speak English, that he had no identification, and that he was Thai. Agent Meyer then asked Mr. Li, in

Thai, "Do you speak Thai?" According to Agent Meyer, Mr. Li's eyes got wide, and his hands started to shake. He appeared dazed and rocked back and forth on his feet. Agent Meyer repeated, in Thai, the question "Do you speak Thai," three or four times, but Mr. Li did not answer. Agent Meyer said that he was concerned that Mr. Li would attempt to flee. He then asked, in English, "What nationality are you," and Mr. Li answered, "I am Chinese." Agent Meyer then placed Mr. Li under arrest, turned him toward the wall, and recovered the walkie-talkie.

After Mr. Li was taken into custody, Agent Meyer began looking for Ms. Chin. Having determined that she was not registered at the Ramada Inn, the agents split up and began looking at other nearby hotels. Agent Meyer and another agent went to a Holiday Inn, located about a mile from the Ramada Inn, and questioned a desk clerk, who told them that two oriental males and one oriental female, who gave their address as Brooklyn, New York, had checked in without luggage at about 3 a.m. Agent Meyer, who had observed Ms. Chin at the Ramada Inn lobby at about 3:10 a.m., described her to the desk clerk as having bobbed hair, wearing glasses, a white shirt, and blue jeans, about 5'4" tall, and oriental. The desk clerk told the agents that the oriental woman who had checked in matched the description of Ms. Chin.

The desk clerk had a housekeeper take the agents up to rooms 433 and 431, where the orientals were registered. At room 433, the agent knocked on the door, but no one answered. They then went to the next room, where the agent again knocked, and again there was no answer. This time, however, the housekeeper also knocked on the door and said, "Housekeeper, clean your room," or something to that effect. Agent Meyer said that they heard a female voice inside say, "What, what what," and the housekeeper repeated her previous statement. At that point, the door opened, and Ms. Chin stuck her head out.

Agent Meyer said, "That's her," and Ms. Chin tried to close the door. The other agent forced the door open, and arrested Ms. Chin in her room.

Motion To Suppress

The defendants argue that the DEA agents did not have probable cause to arrest Mr. Li and Ms. Chin on the morning of October 26, 1989. Therefore, they argue that evidence seized from them as a result of that arrest should be suppressed. *See United States v. Calandra*, 414 U.S. 338, 347, 38 L.Ed.2d 561, 571 (1974) (evidence obtained in violation of the Fourth Amendment, including the fruits of the illegally seized evidence, cannot be used in a criminal proceeding against the victim of the illegal search and seizure). I disagree.

Mr. Li

In regard to Mr. Li, Agent Meyer had probable cause to arrest him in the coffee shop if he had sufficient evidence for a reasonably prudent person to believe that Mr. Li was committing a criminal act. *United States v. Fleming*, 677 F.2d 602, 606 (7th Cir. 1982). In this case, Agent Meyer was investigating a conspiracy to distribute white heroin. He had been told by Agent Ly that two men would pick up the heroin, and only one had been apprehended when he entered the coffee shop. Moreover, he had received information from agents experienced in white heroin trafficking that Chinese drug dealers traveled in groups. When he entered the coffee shop, he noticed an oriental man sitting by himself,[2] staring intently out

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[2] Agent Meyer testified that there were four or five other persons sitting at the end of the L-shaped lunch counter, but that Mr. Li was sitting by himself near the door, at the corner of the counter. Agent Meyer also testified that, although Mr. Li was staring in the direction of the Ramada Inn parking lot, that the portion of the lot where the blue Honda was parked was not visible from the coffee shop because of the shape of the Ramada Inn.

the window at the hotel parking lot. He also noticed an object that looked similar to the walkie-talkie he had seen in the blue Honda at Mr. Li's feet. Finally, Mr. Li lied to Agent Meyer by telling him that he was Thai, and was no doubt shocked when he realized that Agent Meyer could speak Thai. While each of these factors might be susceptible of innocent construction, probable cause does not require that "every inference in the chain be susceptible only of nefarious explanations." *Id.* at 605-06. Based upon the totality of the circumstances facing Agent Meyer, and the practical considerations he faced during his encounter with Mr. Li, I conclude that he had probable cause to believe that Mr. Li was engaged in a conspiracy to distribute narcotics.

Ms. Chin

Ms. Chin argues primarily that the government relies impermissibly on a voice identification of Ms. Chin by Agent Ly that occurred after she was arrested as evidence of probable cause. Again, I disagree.

First, Ms. Chin was seen in the lobby of the Ramada Inn with Mr. Chen, immediately before a woman telephoned Agent Ly in his room and told him that Mr. Chen wanted to conduct the transaction at that time rather than at noon as originally planned. Following Mr. Chen's arrest, the agents discovered an oriental woman matching the description of the woman that Agent Meyer had seen in the lobby of the Ramada Inn registered at a nearby hotel along with two oriental men, each of whom gave a New York City address. Finally, after the housekeeper knocked on the door to Ms. Chin's room and induced her to open the door, Agent Meyer identified her as the person he had seen in the lobby with Mr. Chen. Based on the totality of the circumstances, in particular the fact that she was seen with Mr. Chen before his arrest and the fact that soon thereafter a woman made the phone call to Agent Ly's room that arranged the meeting between Mr.

Chen and Agent Ly, I conclude that the agents had probable cause to believe that Ms. Chin was engaged in the conspiracy to distribute narcotics when she opened the door to her room.

Conclusion

I found DEA Agents Ohlin and Meyer to be credible witnesses. Based on the totality of the circumstances that existed on the morning of October 26, 1989, I conclude that the agents had probable cause to arrest Mr. Li and Ms. Chin, and I recommend that the defendants' motions to suppress evidence be denied.

/s/ Elaine E. Bucklo
ELAIN E. BUCKLO
United States Magistrate

Dated: February 20, 1990.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

May 9, 1991

Before HON. JOHN L. COFFEY, Circuit Judge

HON. FRANK H. EASTERBROOK,
Circuit Judge

HON. JESSE E. ESCHBACH,
Senior Circuit Judge

Nos. 90-2325, 90-2326, 90-2359 & 90-2495

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MING WAN LEUNG, *et al.*,
Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division

No. 89 CR 906—Suzanne B. Conlon, *Judge*

ORDER

Defendants-Appellants, Ming Wan Leung and Lau Ching Chin, filed a petition for rehearing and suggestion of rehearing en banc on April 25, 1991. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

Supreme Court, U.S.
FILED
SEP 11 1991
OFFICE OF THE CLERK

(2)

No. 91-71

In the Supreme Court of the United States

OCTOBER TERM, 1991

MING WAN LEUNG AND LAU CHING CHIN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether DEA agents' entry of petitioners' hotel room under exigent circumstances contravened *Payton* v. *New York*, 445 U.S. 573 (1980).

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-71

MING WAN LEUNG AND LAU CHING CHIN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 929 F.2d 1204.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 1991. Pet. App. 1a-9a. A petition for rehearing was denied on May 9, 1991. Pet. App. 21a. The petition for a writ of certiorari was filed on July 10, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner Ming Wan Leung (Ming) was convicted of conspiring to possess and distribute heroin, in violation of 21 U.S.C. 846 (Count 1), and traveling in interstate commerce with the intent to promote and facilitate narcotics offenses, in violation of 18 U.S.C. 1952 (Count 2). Petitioner Lau Ching Chin (Lau) pleaded guilty to both Counts 1 and 2 at the close of the government's case. Ming was sentenced to a total of 293 months' imprisonment and five years' supervised release. Ming C.A. App. 1A-4A. Lau was sentenced to a total of 210 months' imprisonment and five years' supervised release. Lau C.A. App. 1-4. The court of appeals affirmed. Pet. App. 1a-9a.

1. The evidence showed that a syndicate in New York ordered 45 kilograms of 83 percent pure heroin from Thailand. Delivery was to occur in Chicago, where the buyers would pay the courier $10,000 for his efforts. Payment for the shipment occurred between the principals. The Thailand National Police learned of the impending transaction and alerted the Drug Enforcement Agency. A DEA agent substituted for the original Thai courier. Pet. App. 2a.

Agent Hoang Ly, posing as the courier, checked into a Ramada Inn near O'Hare Airport in Chicago and called New York to notify the buyer. After Agent Ly spoke with petitioners' co-defendant Sa Mei Chen, the two agreed to talk a few hours later when someone who spoke English better than Sa would be available. The next time Agent Ly called, Sa turned the telephone over to petitioner Lau. After asking Agent Ly whether he had the "lucky money," Lau told Agent Ly that "her friends" would pick up

the heroin at noon the next day. She told Agent Ly that the $10,000 fee would be "no problem" and that he should expect to deliver the heroin to two Chinese. Pet. App. 2a.

Ly briefed the other DEA agents about what to expect during the pickup. Based on his 23 years of experience in the Asian heroin trade, Agent Ly told the agents that the Chinese would appear before the agreed pickup time, and that more than two would come. The leader, Ly thought, would linger in the background directing operations. The agents planted themselves around the hotel. Pet. App. 2a-3a.

Sa and Lau appeared in the lobby of the Ramada Inn between 3:00 a.m. and 3:45 a.m. the next day to reconnoiter. Lau called Agent Ly's room at 4:00 a.m. and instructed Agent Ly to meet him in the lobby at 4:45 a.m. After Agent Ly met Sa in the lobby, the two returned to Agent Ly's room, where Sa paid the $10,000 and Ly gave Sa the key to a locker containing the heroin. Agent Ly then called for a porter to move the locker to the car. That was the signal for the other agents, who closed in. Sa jumped out the window but was arrested in the parking lot. The agents then fanned out to find Sa's confederates. Pet. App. 3a.

Seeking petitioner Lau and any additional members of the team, the agents started canvassing nearby hotels. Agent Meyer arrived at a Holiday Inn at about 7:00 a.m. and learned from the night manager that he had earlier seen an Asian woman resembling Lau, and that two Asian men had checked into the hotel at about 3:00 a.m., arriving without reservations or luggage. They had taken two rooms, and both had listed New York City addresses on the registration cards. See Gov't C.A. Br. 11.

Meyer and another agent accompanied one of the motel's housekeepers to the room that had been assigned to the Asians earlier that night. The agents knocked on both doors and received no responses. Gov't C.A. Br. 11-12. The housekeeper then knocked on one of the doors and said that she wanted to clean. A woman opened the door. Agent Meyer recognized the woman, who turned out to be Lau, as one of the pair who had reconnoitered the lobby of the Ramada Inn. He yelled: "That's her." Lau tried to slam the door, but the agents forced their way in. One of the agents saw a shadow in the curtain and spotted petitioner Ming on construction scaffolding adjoining the balcony trying to escape. Agent Meyer followed Ming onto the scaffolding and, with help from other agents, returned him to the room. The agents searched the room and found $102,000 in cash, a mobile telephone, a pager, and notes containing the telephone number of a hotel in Bangkok and information Agent Ly had provided over the telephone when he talked to Lau in New York. An agent asked Lau how much money there was; Ming replied, "$100,000." Pet. App. 4a.

2. On appeal, petitioner Lau argued that her privately retained attorney rendered ineffective assistance of counsel by abandoning the issue of the warrantless entry and seizure of evidence from the room at the Holiday Inn.[1] Petitioner Ming similarly

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[1] Lau pleaded guilty under Fed. R. Crim. P. 11(e)(1) and accordingly waived her right to appeal the Fourth Amendment issues. In the district court, Lau's counsel had filed a motion to suppress, asserting that Lau had been arrested without a warrant or probable cause and that her hotel room had been searched "without a warrant, without consent, and without probable cause." Lau C.A. App. 20-21. Nevertheless, Lau claimed on appeal that her counsel improperly abandoned the issue of the validity of the entry into the hotel room by not

argued that his privately retained attorney rendered ineffective assistance by failing to file a motion to suppress both the evidence seized from the room at the Holiday Inn and his post-arrest statements. Ming C.A. Br. 14-34.

Rather than directly address the ineffective assistance claims, the court of appeals stated that "[i]t is simple to resolve the search, seizure and interrogation questions on the merits, and we accordingly do not decide whether the attack on the performance of counsel would be a sufficient way to smuggle these issues through the back door." Pet. App. 5a. The court then concluded that "[a]t each step the agents acted professionally, with ample foundation and within the bounds set by the Constitution." *Ibid.*

The court of appeals first found that the arrest entry at the Holiday Inn was reasonable. The court noted that Agent Ly had told the agents to expect more than two Chinese, and that the knowledge that a group of Asians, including a woman, arrived unexpectedly and without luggage at 3:00 a.m. at a Holiday Inn justified further investigation. The court further found that the agents properly used the ruse to see who would answer the door, and that Lau's appearance at the door provided probable cause to believe that the occupants of the room were involved in the heroin deal. The court emphasized that "no one, not even the housekeeper, entered the room until probable cause had been established." Pet. App. 6a. All the agents got from the ruse, the court observed, was a look at Lau's face, which she willingly exposed.

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mentioning it at the suppression hearing, and instead concentrating on the argument that the agents lacked probable cause to arrest her. Lau C.A. Br. 8-12.

> The tactics respected the privacy interests of the occupants, who could have elected not to answer the knock on the door. If someone other than Lau had opened the door, the agents would have departed, leaving the occupants undisturbed * * *. Innocent persons would have been fully protected; the agents' tactics were a threat only to the guilty.

Id. at 7a. The court also concluded that exigent circumstances justified the agents in taking action on probable cause, without awaiting a warrant. "Once the agents arrested Sa," the court commented, "it was only a matter of time before the others, expecting and not receiving a message, fled. The agents did not know where these others could be found, even who they were." *Ibid.* The court noted that if the agents had not acted quickly, the suspects might have escaped or evidence might have been destroyed. *Ibid.*

ARGUMENT

Petitioners claim that the DEA agents violated the Fourth Amendment by "gaining entry into a dwelling to effect an arrest through the use of a ruse." Pet. i, 5-10.

1. At the outset, we note that neither petitioner preserved this issue for review. Lau pleaded guilty and thereby waived her right to object to the seizure of the evidence on appeal, and Ming did not move in the district court to suppress the evidence seized as a result of the hotel room entry. As the court of appeals noted, the only issue presented on appeal was whether counsel's failure to raise and preserve those issues in the district court constituted ineffective assistance of counsel. We submit that, for the reasons set forth below and discussed by the court of appeals, the Fourth Amendment argument made by petition-

ers in the court of appeals was without merit. In any event, the Fourth Amendment argument was certainly not so compelling that it must be regarded as "gross incompetence" for petitioners' attorneys either not to raise the issue (in Ming's case) or to counsel abandoning it (in Lau's case) in favor of a plea of guilty. See *Kimmelman* v. *Morrison*, 477 U.S. 365, 382 (1986).

2. Even if the Fourth Amendment issue were squarely presented here, petitioners' claim would be without merit. Petitioners place great weight on the assertion that the DEA agents improperly gained entry into the motel room by using a ruse. The agents, however, did not enter the room through the use of the ruse. Rather, the sole purpose of the ruse was to see who answered the door, and the only product of the ruse was a look at Lau's face, which she willingly exposed and in which she surely had no privacy interest. As the court of appeals put it, "[t]he tactics respected the privacy interests of the occupants, who could have elected not to answer the knock on the door. If someone other than Lau had opened the door, the agents would have departed, leaving the occupants undisturbed." Pet. App. 7a.

Because the ruse in this case was employed only to determine who would answer the door—and not to obtain entry into the room to make an arrest—the result in this case follows *a fortiori* from *Lewis* v. *United States*, 385 U.S. 206 (1966). In *Lewis*, an undercover narcotics agent obtained entry into the house of a drug dealer by posing as a buyer of narcotics. This Court held that the police conduct did not violate the Fourth Amendment. As the Court stated, "it has long been acknowledged * * * that, in the detection of many types of crime, the Government is entitled to use decoys and to conceal the

identity of its agents." *Id.* at 208-209. If the agent's use of a ruse to obtain entry into the dealer's house in *Lewis* was permissible, the use of the ruse in this case merely to determine who, if anyone, would open the door of the motel room was certainly permissible as well.

3. Petitioners' contention that the court of appeals' decision in this case contravenes *Payton* v. *New York*, 445 U.S. 573 (1980), is mistaken. As petitioners recognize (Pet. 6-7), *Payton* held that, *absent exigent circumstances*, the Fourth Amendment prohibits the police from making a warrantless entry into a suspect's home to make a felony arrest. 445 U.S. 587-588, 590. Because the agents' entry in this case was based on exigent circumstances, the court of appeals correctly held that their entry did not violate *Payton*.[2]

The court of appeals' fact-bound conclusion that there were exigent circumstances is amply supported by the record in this case. As this Court stated last Term in *Minnesota* v. *Olson*, 110 S. Ct. 1684 (1990), a court "applie[s] essentially the correct standard in determining whether exigent circumstances existed" in inquiring whether a warrantless entry is justified by, *inter alia*, "imminent destruction of evidence" and "the need to prevent a suspect's escape." *Id.* at 1690.[3] In this case, once the agents arrested

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[2] Contrary to petitioners' contention (Pet. 8), the government did not argue, and the court of appeals did not find, any "'consent' to entry" by Ming and Lau. The agents entered the room based on exigent circumstances, not consent. *Riddick* v. *United States*, 445 U.S. 573 (1980) (the companion to *Payton*), is thus of no help to petitioners.

[3] This Court also added that "the gravity of the crime and the likelihood that the suspect is armed should be considered." *Olson*, 110 S. Ct. at 1690. In that regard, we note that the

Sa, it was only a matter of time before Sa's confederates, expecting and not receiving a message, destroyed the remaining evidence and fled.[4] Once the agents recognized Lau as the person whom they had seen in the lobby of the Ramada Inn, it was doubly important that they work quickly. As Ming's flight shows, petitioners could have escaped from the back of the motel while agents guarded the front. Moreover, it was impossible to know what evidence would have been destroyed if the officers had attempted to barricade the doors to the room while sending for a

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heroin involved in this case had a street value of up to $31 million. Gov't C.A. Br. 5, citing Tr. 159, 179, 590. And "it has uniformly been recognized that substantial dealers in narcotics possess firearms and that such weapons are as much tools of the trade as more commonly recognized drug paraphernalia." *United States* v. *Payne*, 805 F.2d 1062, 1065 (D.C. Cir. 1986).

[4] See *United States* v. *Marin-Cifuentes*, 866 F.2d 988, 991-992 (8th Cir. 1989) (finding that exigent circumstances justified warrantless arrest in hotel room where remaining co-conspirators, who were in close contact with remaining conspirator, had just been arrested; "[i]t would have been foolhardy to not make the arrest of Quitian at the same time to avoid the destruction of evidence or risk the chance of flight"); *United States* v. *Newbern*, 731 F.2d 744, 748-749 (11th Cir. 1984) (exigent circumstances existed justifying warrantless entry of motel room to effect arrest where members of the conspiracy remained at large, leading to the potentially dangerous situation of having other co-conspirators arrive on the scene and join the motel room occupants); *United States* v. *Manfredi*, 722 F.2d 519, 522 (9th Cir. 1983) (upholding warrantless arrest in hotel room, and noting that failure of emissary in drug deal to return as expected would "inevitably" alarm those waiting for his return).

warrant. Thus, there was no practical alternative to entering the room to make the arrests.[5]

At bottom, petitioners' contention reduces to the assertion that the agents manufactured exigent circumstances in order to avoid the requirements of *Payton*. For the reasons stated above, the facts of this case belie that contention. At the time the ruse was undertaken, the agents were investigating who might be in the room, did not have probable cause to obtain a warrant, and did not have the time to plant themselves outside the room and wait indefinitely for the inhabitants to show their faces. Most of the exigent circumstances already existed, and the additional urgency caused by Ming's flight was caused not by an attempt to circumvent *Payton*, but as a result of a legitimate investigative technique. See *United States* v. *Zabare*, 871 F.2d 282, 289-290 (2d Cir.), cert denied, 493 U.S. 856 (1989) (rejecting argument that circumstances are not "exigent" if appropriate method of investigation gives rise to exigency).

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[5] The court of appeals' decision does not conflict with *United States* v. *Johnson*, 626 F.2d 753 (9th Cir. 1980), aff'd on other grounds, 457 U.S. 537 (1982). In *Johnson*, two Secret Service agents approached Johnson's house, knocked on the door, and misrepresented their identities. When Johnson answered, both had their guns drawn and requested admission. 626 F.2d at 755-757. Unlike in this case, there were no exigent circumstances in *Johnson*, and the agents had ample time to obtain a warrant before going to Johnson's house. *Id.* at 755.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 45069

FILED
SEP 24 1991
OFFICE OF THE CLERK

No. 91-71

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

MING WAN LEUNG and LAU CHING CHIN,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

On Joint Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT REPLY BRIEF

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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JOINT REPLY BRIEF

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1. The government's principal argument in its brief opposing certiorari is that the use of a ruse was permissible because "the sole purpose . . . was to see who answered the door." Brf. for United States 7. By answering the door, the government's argument goes, petitioner Lau "willingly exposed [her face] in which she surely had no privacy interest." *Id.* In essence, the government's position is that search and arrest warrant requirements do not apply to a visual inspection of the interior of a dwelling as opposed to a physical entry across the front door threshold. Thus, in the government's view, the circuit court correctly held that agents may use trickery or a ruse to visually inspect a dwelling to determine if a suspect is present.

The government's position that no "search" occurs absent a physical entry conflicts with *Katz v. United States*, 389 U.S. 347, 353 (1967), which observed that "the reach

of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure," and subsequent cases implementing this principle. *See, e.g., Arizona v. Hicks*, 480 U.S. 323 (1987) (even slight movement of an object which exposes to view concealed portions of an apartment or its contents constitutes a "search" for which a warrant is required); *California v. Ciraolo*, 476 U.S. 215 (1986) (warrantless aerial observation of residential backyard did not constitute a search only because the area was in plain view and the police employed no physically intrusive means to facilitate their visual surveillance); *United States v. Karo*, 468 U.S. 705, 714-15 (1984) ("[a]t the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant"; thus, Fourth Amendment was violated where the police used a radio transmitter to monitor conduct in a house even though the police did not physically enter the home to search); *United States v. Winsor*, 846 F.2d 1569 (9th Cir. 1988) (*en banc*) ("search" requiring a warrant occurred when the police looked into a hotel room through a door that was opened at their command while they stood in a corridor).

Consistent with these decisions, a "search" clearly occurred when agents visually inspected petitioner Lau's face and hotel room by means of a ruse. This case squarely presents the question, which has divided the circuits, whether such deceit may be used to circumvent arrest and search warrant requirements that ordinarily apply to such a police intrusion into a private dwelling.

The government's contention that petitioner Lau "willingly" exposed her face to the police officers' view is specious. Lau did not respond to the knocking on the door until the officers' deceptive entreaty, "housekeeping," was used. As the other circuits confronting such a scenario have held, a "consent" induced through such police trick-

ery is not voluntary and does not overcome the warrant requirement. *See* Joint Petition 7-8. While the seventh circuit has adopted the government's contrary view, it has thereby created a circuit conflict which only this Court can resolve.

The government's further contention that the ruse was employed "only to determine who would answer the door . . . and not to obtain entry into the room to make an arrest," Brf. 7, is disingenuous. The record is clear that the agents were looking only to locate Lau and any accomplices, and then to arrest them, and that is exactly what the agents did. This was not an undercover investigation as in *Lewis v. United States*, 385 U.S. 206 (1966).

Finally, the government argues that the exigent circumstances exception to the warrant requirement justified the entry into Lau's hotel room when she tried to shut the door that the agents had tricked her into opening. This argument is a red herring. Of course, once the agents ascertained that Lau was in the hotel room and she tried to escape from them by closing the door, the circumstances were exigent. But for the exigent circumstances exception to justify the use of the ruse itself to gain visual access to the apartment, which is the issue petitioners have raised, the focus must be on the circumstances that existed at the time the ruse was employed. If the use of the ruse was unlawful, then what followed was the tainted fruit of that illegality and cannot be used to justify a still greater intrusion. Since the government concedes that probable cause, which is a necessary element of the exigent circumstances exception, *see Welsh v. Wisconsin*, 466 U.S. 740, 749 (1984), did not exist until *after* the agents' use of the ruse, Brf. 10, the exigent circumstances exception does not apply.

2. The government suggests that the Fourth Amendment issue should not be reviewed because it is raised in the context of an ineffective assistance of counsel claim. Brf. 6-7. But the court of appeals reviewed petitioners'

Fourth Amendment argument on the merits in order to determine whether to reach the broader, ineffectiveness issue. If this Court concludes that the court of appeals' Fourth Amendment holding was wrong, it need simply remand to permit the lower court to address whether the defense attorneys' failure to raise or pursue the issue constituted a constitutional violation and whether petitioners were prejudiced. *See, e.g., Kimmelman v. Morrison*, 477 U.S. 365 (1986). Needless to say, we disagree with the government's casual dismissal of petitioners' ineffectiveness claim. In view of the substantial case law in existence prior to petitioners' trial holding that a ruse entry violates the Fourth Amendment, and the absence of any strategic reason for failing to raise or pursue such a claim, petitioners' attorneys' conduct appears indefensible.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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September, 1991